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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

E.J.T. CONSTRUCTION CO., INC. AND NATIONAL FIRE INSURANCE COMPANY OF HARTFORD AND AMERICAN CASUALTY COMPANY OF READING,

Petitioners,

v.

UNITED STATES OF AMERICA FOR THE USE OF BILLOWS ELECTRIC COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 2, 1982

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT BELOW IMPROPERLY INTERPRET AND IMPERMISSIBLY EXPAND THE MILLER ACT STATUTORY LANGUAGE "SUMS JUSTLY DUE" SO AS TO PERMIT RECOVERY BY A MATERIAL SUPPLIER (PURSUANT TO AN ORAL SUBCONTRACT BETWEEN THE MATERIAL SUPPLIER AND THE SUBCONTRACTOR OF THE GENERAL CONTRACTOR) AGAINST THE GENERAL CONTRACTOR AND ITS MILLER ACT SURETIES FOR SERVICE CHARGES, EVEN THOUGH THE COURT PRECLUDED ANY CONTRACT RECOVERY AGAINST THE GENERAL CONTRACTOR AND BONDING COMPANIES UNDER THE MILLER ACT UNDER THAT SAME ORAL SUBCONTRACT.

II. DID THE COURT BELOW COMMIT ERROR IN ITS FINDINGS AND HOLDING THAT A DIRECT CONTRACTUAL RELATIONSHIP EXISTED BETWEEN THE MATERIALMAN BILLOWS AND THE GENERAL CONTRACT E.J.T. AND WAS ENTERED INTO ON OR ABOUT DECEMBER 1, 1977 THEREBY RELIEVING THE MATERIALMAN OF THE NINETY DAY NOTICE REQUIREMENT OF THE MILLER ACT CONTAINED AT 40 U.S.C. § 270b(a) AND THEREBY CONTRACTUALLY OBLIGATING THE GENERAL CONTRACT E.J.T. TO THE MATERIALMAN BILLOWS.

DESIGNATION OF CORPORATE RELATIONSHIP

E.J.T. Construction Co., Inc., National Fire Insurance Company of Hartford and American Casualty Company of Reading, Petitioners in this proceeding, filed this Petition for Writ of Certiorari and state that:

1. This is the original designation of corporate relationships.

2. E.J.T. Construction Co., Inc. is not owned by any parent corporation.

3. CNA Insurance is the parent of National Fire Insurance Company of Hartford and American Casualty Company of Reading.

4. E.J.T. Construction Co., Inc. does not have any ownership interest in any subsidiary.

5. National Fire Insurance Company of Hartford and American Casualty Company of Reading do not have any ownership interest in any subsidiary.

6. E.J.T. Construction Co., Inc. does not have any affiliates.

7. National Fire Insurance Company of Hartford and American Casualty Company of Reading are affiliates of each other and share the following affiliates: Transportation Insurance Company, Continental Casualty Company, Transcontinental Insurance Company and Valley Forge Insurance Company.

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Petitioners,

v.

UNITED STATES OF AMERICA FOR THE USE OF BILLOWS ELECTRIC COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

E.J.T. Construction Co., Inc., National Fire Insurance Company of Hartford and American Casualty Company of Reading, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 3, 1983, Petition for Rehearing denied on May 27, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix A hereto, *infra*, page 15a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, page 15a) was entered on May 3, 1982. A timely Petition for Rehearing was denied on May 27, 1982 (Appendix A, *infra*, page 18a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS

This case involves § 270(a) of the Miller Act, which provides as follows:

> **§ 270b. Same; rights of persons furnishing labor or material**
>
> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act [40 USCS §§ 270a et seq.] and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship

with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

STATEMENT OF CASE

On February 16, 1978, Billows Electric Supply, Inc. (hereinafter "Billows") filed a Complaint in The United States District Court for the Eastern District of Pennsylvania pursuant to the Miller Act, 40 U.S.C. § 270a *et seq.* (hereinafter "the Miller Act") against, *inter alia*, E.J.T. Construction Co., Inc. (hereinafter "E.J.T."), National Fire Insurance Company of Hartford and American Casualty Company of Reading, Pennsylvania. This Complaint as well as the two later Complaints all joined for trial sought to recover monies which Billows claimed were due as a result of supplying material through a series of purchase order invoices pursuant to an oral contract with B.D. Thomas Company, a subcontractor of E.J.T.'s (hereinafter "Thomas"). In the second and third Complaints, Billows continued to seek

recovery as a material supplier under the Miller Act from E.J.T., the prime contractor, and its two sureties based on the oral subcontract agreement with Thomas and also sought recovery under a direct contractual relationship with E.J.T.

At trial, it was established that Brian Thomas, the principal of the Thomas Company, entered into a written subcontract agreement with E.J.T. for $600,500.00 and that in fulfilling the requirements of that contract, he purchased a major portion of his material requirements from Billows, and that he did not have a written contract with Billlows, but would order materials as needed and that the terms of payment were that if he paid his monthly bills by the 10th of a month, he would get a two percent discount and that if he paid them within thirty days, he would owe the net amount and that if he owed money at a point in time after sixty days, there was a service charge, which is the focal point of this appeal.

The testimony reflected that all invoices were always addressed and sent to Thomas, although E.J.T. did commence to receive copies at a later date, that the monthly statements which were the only notice of the service charges were never sent to E.J.T. by Billows, that Thomas would either order material in person or over the phone and that the outstanding invoices totalled $50,634.58 in principal and $38,583.38 in service charges.

The testimony further reflected that problems with payments for materials supplied by Billows to Thomas occurred so that a joint payment check procedure was thus initiated and implemented and had been in effect for some period of time. In November of 1977, a secretary of E.J.T.'s vice-president wrote a letter dated

November 28, 1977 advising that another joint check in the amount of $29,528.78 was being delivered and that no further payments for past indebtedness from Thomas to Billows would be made to Billows until all materials were delivered to the job site, a condition which E.J.T. claims was never met.

In response to the letter of November 28, 1977, Jeff Billow wrote Edward J. Troise, Jr. on December 1, 1977 and confirmed an alleged arrangement to receive payments of $10,000.00 every thirty days against the existing Thomas account and sought confirmation that all future materials shipped would be paid for within thirty days after delivery.

No further communication occurred between E.J.T. and Billows and only seven days later on December 8, 1977, Billows sent the first Miller Act notice letter to E.J.T. although Billows continued to deliver materials to the job site through Thomas and to send the monthly statements which contained the service charges to Thomas. No further monies either for existing indebtedness prior to December 1, 1977 or for shipments of material subsequent to December 1, 1977 were ever received from E.J.T. by Billows and E.J.T. never ordered any material directly from Billows.

The Court below determined, contrary to the contention of E.J.T., that a sufficient course of conduct and dealing existed to create a direct contract relationship under the Miller Act and that even though no recovery under the Miller Act otherwise was permitted on the oral subcontract between Billows and Thomas, that Billows could recover service charges which were a part of that oral subcontract against E.J.T. and the bonding companies, both of which constitute improper constructions of the Miller Act and are the subject of this appeal.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Eastern District of Pennsylvania exercised jurisdiction in these Miller Act cases pursuant to the provisions of 40 U.S.C. § 270a, *et seq.*

REASONS FOR GRANTING THE WRIT

I.

The Court Below Improperly Interpreted And Impermissibly Expanded The Miller Act Statutory Language "Sums Justly Due" So As To Permit Recovery By A Material Supplier (Pursuant To An Oral Subcontract Between The Material Supplier And The Subcontractor Of The General Contractor) Against The General Contractor And Its Miller Act Sureties For Service Charges, Even Though The Court Precluded Any Contract Recovery Under The Miller Act Under That Same Oral Subcontract.

The Court below in a decision of sweeping significance permitted Billows to recover the undisputed amount of accumulated service charges of $38,533.38 by means of a misguided application of the Miller Act language of "sums justly due". Such a result was and is shocking to Petitioners from a factual point of view since (1) the agreement between Billows and Thomas was oral to begin with, (2) even though E.J.T. at one point in time commenced to receive invoices, these invoices did not indicate the service charge which appeared only on the monthly statements sent exclusively to Thomas, and (3) in the case of the sureties, until the actual filing of suit, there is no way they could ever have any notice of these charges.

This same result was and is also far-reaching from a legal point of view in that the Court below permits Billows to recover these monies under the Miller Act by reference back to the subcontract agreement (oral) between Thomas and Billows thus producing the inexplicable result that although Billows could not recover against E.J.T. on its main claim under the subcontract agreement with Thomas, Billows can recover service charges against E.J.T. and the sureties under that same oral subcontract agreement. This is non-following, contrary to the language, history and decided cases under the Miller Act and upsets the standards previously relied on by general contractors and surety companies under the Miller Act and substantially emasculates the existing Miller Act case law.

It is respectfully submitted that the holding of the Court below in this case (1) renders uncertain how far the liability of a general contractor and bonding company may be extended, (2) creates a heretofore unenunciated bifurcated liability where a general contractor and bonding company may be liable to a supplier or person not in privity and not otherwise meeting the Miller Act notice requirements, (3) creates the possibility of collusion between subcontractors and suppliers as to the prime contractor and bonding company, especially where as here no writing is available to the prime contractor or bonding company and (4) foments litigation by encouraging collateral litigation bottomed on the availability of inconsistent claims. It is urged that review by this Court is necessary to correct this situation since, if this result continues intact, general contractors and bonding companies cannot, until the passing of the Miller Act limitation period, ever be able to ascertain with certainty the nature and extent of their potential obliga-

tions thereunder. The Court below seriously misreads and misinterprets the Miller Act when it permits the result decreed in this case where recovery is denied under a contract because of failure to comply with notice provisions and yet imposed as to other provisions of that same contract under a theory never articulated or explained in any way.

Petitioners are unaware of any holding by any court construing the Miller Act where the same result has been reached as promulgated by the Court below.

The two cases cited by the District Court and not disaffirmed by the Court below for its startling conclusion are *D&L Construction Co. v. Triangle Electric Supply Co., Inc.*, 332 F.2d 1009 (8th Cir. 1964), and *Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc.*, 336 F.2d 445 (8th Cir. 1964). The obvious distinction between *D&L, supra,* and *Continental, supra,* and the facts of this case is that in those cases, the Eighth Circuit permitted recovery of prejudgment interest where such recovery was in conjunction with a recovery under the same subcontract. In this case, to the contrary, the Court below has permitted recovery of a principal claim under an alleged direct contract and recovery of the service charges here complained of pursuant to a completely separate oral contractual arrangement thus creating a form of bifurcation of Miller Act liability.

Stated otherwise, if there is to be any recovery for service charges in the instant case, Petitioners urge that such recovery can only be as a result of the alleged direct contract relationship which the Court below found to exist between E.J.T. and Billows since that is the sole basis on which the Court below otherwise found E.J.T. and the sureties obligated to Billows at all. Since the only testimony or documentation cited by the Court

below to establish any direct agreement between E.J.T. and Billows were the letters of November 28, 1977 and December 1, 1977, of which neither contain any reference, direct or indirect, to service charges in any form, it is clear that recovery of the service charge cannot be supported under the express or implied contractual principle utilized to justify the result of the main claim. While it is undisputed that in *D&L, supra,* and *Continental, supra,* the Eighth Circuit held that the liability of the general contractor, sureties and materialman under the Miller Act is governed by the contract pursuant to which the materialman furnished materials to the subcontractor, that basic proposition can hardly accommodate the facts of this case where the materialman's recovery is in no way based on its underlying oral subcontract agreement with the subcontractor, Thomas.

If the Eighth Circuit's language in *D&L, supra,* and *Continental, supra,* is to be applied literally by this Court as it evidently was in the Court below, it would mean that this Court would approve and engraft upon the Miller Act the provision that service charges could be contractually governed by one contractual arrangement under circumstances where the person obligated for the service charges was not obligated by that same contract for the principal claim and indeed where he had no notice or means or awareness of such possible liability.

It is respectfully urged that the issue in this case involving a proper interpretation of the Miller Act has never been decided by this Court nor has this Court otherwise spoken precisely on the issue. Where this Court has spoken on the question of the proper interpretation to be afforded the Act such as in *F.D. Rich Co., Inc. v. United States Ex Rel. Industrial Lumber Co., Inc.,* 417 U.S. 116 (1974), by holding that recovery

of attorneys fees was not a part of Miller Act relief to be granted under the statutory language "sums justly due", but would only be granted pursuant to express contractual provisions, this Court has lent support to Petitioners' contentions. The *Rich* case itself dealt with recovery under a specific subcontract agreement sued on and it is respectfully submitted that such past limitations of the United States Supreme Court on the statutory language "sums justly due" be carefully reviewed by this Court and applied to prevent recovery of the service charges from Petitioners created by the separate oral subcontract agreement between Thomas and Billows in the instant case.

II.

The Court Below Committed Error In Its Findings And Holding That A Direct Contractual Relationship Existed Between The Materialman Billows And The General Contractor E.J.T. And Was Entered Into On Or About December 1, 1977 Thereby Relieving The Materialman Of The Ninety Day Notice Requirement Of The Miller Act Contained At 40 U.S.C. § 270b(a) And Thereby Contractually Obligating The General Contractor E.J.T. To The Materialman Billows.

In the second and third Complaints (but not the initial Complaint) which were filed on December 1, 1978 and March 19, 1979 respectively, Billows sought for the first time to assert the existence of a direct contractual relationship with E.J.T., since by that time Billows had failed to provide proper Miller Act notice to recover under the 90 day written notice requirement of the Act.

This result is distressing since it is quite clear from all of the testimony that E.J.T. at all times dealt only with and through its subcontractor, Thomas, and Thomas in turn would deal with Billows and the issuance of the joint check for $29,528.78 was entirely consistent with its on-going agreement to make payments under the Thomas subcontract by joint checks to Thomas and Billows and did not constitute the establishment of a direct contractual relationship. Factually, this is borne out by *inter alia* (1) the continuing presence of Thomas on the job until the end, (2) the continuing submission of invoices from Billows to Thomas and the ordering of all material from Billows by Thomas, (3) the submission of monthly statements by Billows to Thomas on a continuing basis, and (4) the delivery of a Miller Act notice letter approximately one week later and the filing of suit on February 16, 1978 by Billows against E.J.T. which aside from creating an adversary relationship did not even allege at the time the existence of a direct contractual relationship between Billows and E.J.T.

E.J.T. urges that this case is closest factually to the decision of the 10th Circuit in *United States v. Hesselden Construction Co.*, 404 F.2d 774 (10th Cir. 1968), which established that a joint checking procedure such as implemented here by E.J.T. does not have the effect of placing a supplier in such a direct contractual relationship with the general contractor so as to eliminate the need for ninety day notice requirements under the Miller Act and that the purpose of such a procedure is simply to permit the materialman to satisfy his material bills from joint checks so that the materialman relies upon the credit of the general contractor and acquires a measure of control over funds to pay his invoices. In full accord with *Hesselden, supra,* are *United States v. Liles Construction Company,* 440 F.2d 474 (5th Cir. 1971), and

United States v. Van de Riet, 316 F.2d 912 (4th Cir. 1963).

It is respectfully submitted that under any application of the facts in the instant case to the Miller Act that a direct contractual relationship did not exist between E.J.T. and Billows. Petitioners recognize that this Court typically does not exercise jurisdiction in disputed fact situations. However, should this Court exercise its jurisdiction to correct the improper Miller Act holding of Argument I, *supra*, then Petitioners believe the contract issue should also be reviewed by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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